Supreme Court, U.S.
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No. 00-866

In The

Supreme Court of the United States

CLARK COUNTY SCHOOL DISTRICT,

Petitioner,

v.

SHIRLEY A. BREEDEN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a reorganization which removes an employee's supervisory responsibilities, her primary job duties, places her in a new position which was previously held by a lesser ranked individual, in a remote location away from the employer's main office, can constitute an "adverse employment action?"

2. Whether the "reasonable belief" standard is met where the employee is subject to improper sexual banter and two weeks of abusive behavior?

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

Shirley Breeden ("Breeden") is a long time employee of the Clark County School District ("School District"). From her start as an entry level, support staff employee right out of high school, Breeden has risen through the ranks to become a high level administrator. In 1990 Breeden was promoted to the job of Director of Support Staff Services, Job Range 41, pursuant to appointment by the Board of School Trustees.

Breeden's Job Duties

According to her performance evaluation, Breeden's primary duties as the Director of Support Staff Services were:

1. Supervise twelve staff members.

2. Provide direction to the Recruitment Specialist regarding the advertisement of all secretarial/clerical positions.

3. Supervise applicant processing including distribution of applications, intake, interviews, screening, and filing applications.

4. Ensure that appropriate references and background investigative reports were obtained.

5. Work with payroll section regarding appropriate pay for all secretarial/clerical employees.

6. Respond to district administrators regarding personnel needs/concerns.

7. Respond to employee/applicant concerns as it relates to employment, transfers, promotion, leaves-of-absence, retirement, and resignation. ER 84.

In short, Breeden was responsible for supervising the employees who were responsible for screening and hiring the School District's 5,000 non-licensed employees, including school police. Breeden and her staff did background checks, reviewed FBI reports, handled leave requests, unemployment claims, and helped place injured workers back to work. As reflected on her annual evaluations, from 1990 to 1994 Breeden received numerous additional job responsibilities and assignments, but *none of her existing job responsibilities were ever taken from her.* ER 64, 70, 86, 88, 172.

As of October, 1994, Breeden was 38 years old and earning $65,000 per year. ER 70. The number of employees Breeden supervised had increased to 15. Breeden's supervisor was Personnel Manager Don Eldfrick. There were rumors that Eldfrick was moved to this position because "he got in trouble with a female teacher." ER 228. When one of Breeden's female employees, Debbie Devro, complained about Eldfrick to the School District's affirmative action officer, Eldfrick told Breeden that "no one who filed harassment charges on him would get away with it." ER 210. Eldfrick admits to having an affair with his secretary, Martha Camman, during this same time period. ER 394.

Breeden's First "Oppositional Activity"

On Friday, October 21, 1994, Breeden attended a meeting to discuss applicants for police officer positions in which she, one of her subordinates, Jim McIntosh, and her direct supervisor, Don Eldfrick, were present. During the meeting Breeden was offended, embarrassed and humiliated by the following exchange between her male supervisor and her male subordinate:

> Don read the comment that the candidate had told the doctor, "I hear making love to you is like making love to the Grand Canyon" and Don looked at me and said, as he shrugged his shoulder, "I don't know what that means," and then Jim said, "Well, I'll tell you later." And they both started laughing. ER 87-88.

Breeden felt Eldfrick knew what the comment meant and intended to make her uncomfortable by shrugging his shoulders, looking straight at her, and facetiously and unnecessarily asking her what it meant. ER 212. Breeden was further offended and embarrassed when Eldfrick approved of McIntosh's unprofessional response and proceeded to enjoy a laugh with, and in front of, her subordinate. ER 204-05.

After she left the meeting Breeden could not stop thinking about Eldfrick's sexist behavior. Later that same day, Breeden complained about Eldfrick's unprofessional conduct to Associate Superintendent Ed Goldman. Dr. Goldman advised Breeden she had three choices – she could file a sexual harassment complaint with the affirmative action officer, she could do nothing, or she could speak directly to Eldfrick. ER 211.

Although she was afraid Eldfrick would retaliate against her based upon his previous statement to her that "no one who filed harassment charges on him would get away with it," Breeden confronted him regarding his embarrassing and offensive behavior at the close of that same business day. ER 210, 213. "I wanted to let him know that I was offended, so it would, we could just resolve it." ER 212.

Despite the fact that Breeden started crying, Eldfrick responded to Breeden's concern with a scowl and a harsh tone. ER 213-14. Eldfrick made no attempt to resolve the situation, apologize or explain his conduct. ER 213-214. The meeting quickly ended and Breeden walked out of Eldfrick's office. ER 213.

After Breeden complained, Eldfrick's attitude toward Breeden changed dramatically. Starting that next Monday, Eldfrick became unfriendly and nasty toward Breeden, he stared at her, and the tone of his voice was harsh and edgy. ER 214, 258, 260. He communicated to her primarily through notes. ER 304. Breeden's secretary also noticed that Eldfrick treated Breeden differently. According to Carolyn Ann Givens:

> [Eldfrick] was curt with her at times. He gave her a lot of work, added responsibility, made comments, different types of comments that I felt were just kind of badgering kind of things. ER 415.

Also after Breeden complained, Breeden's secretary recalls Eldfrick making a comment at a staff meeting, stating that "Breeden may be in the unemployment line . . . " ER 415-16.

In the meantime, Goldman contacted Eldfrick's supervisor, George Ann Rice, and recounted his conversation with Breeden. Of substance, Goldman told Rice two very significant pieces of information. Number one, Goldman told Rice that Breeden had a concern about "sexual harassment." Number two, Goldman informed Rice that he advised Breeden to speak with the School District's affirmative action officer, Tom Rodriguez. ER 334. After hearing from Goldman, Rice took Eldfrick to meet with Rodriguez. ER 369. Thus it was Goldman, not Breeden, who identified the problem as "sexual harassment" and who led to the involvement of the School District's affirmative action officer.

Meanwhile, Breeden was enduring Eldfrick's negative treatment of her. After two weeks of such treatment, Breeden complained to Goldman again, who urged her to complain to Rice. After telling Rice "what had happened," Rice asked Breeden why she had not come to her and told her first, instead of going to Goldman. ER 306. Rice responded by immediately blaming Breeden for the situation. Rice asked her, "Well, what are you going to do?" Breeden stated, "Well, what do you mean, what am I going to do?" Rice explained, "What are you going to do to bring harmony back in the department?" ER 306. Rice obviously blamed Breeden for creating "disharmony" in the department by complaining about Eldfrick.

Breeden's First Tangible Employment Action

Approximately one month after Breeden complained to Rice, she was called into a meeting with Rice and Eldfrick. ER 335-40, 369-70. In this meeting, Breeden was

advised that although her title would remain the same, her entire job was being changed. Breeden's responsibility for overseeing the recruitment, hiring and firing of the School District's 5,000 support staff employees, including the 15 employees who were under her immediate supervision, was taken away from her. Instead, Breeden would only handle unemployment and Family Medical Leave claims for support staff and licensed personnel. Despite the School District's creative attempt to put a positive spin on this change, it was obviously a substantial reassignment leaving Breeden with substantially less supervisory responsibility. Also, this was the first time Breeden's existing job duties had been changed, and there is no documentary evidence supporting the School District's assertion that this reorganization had been planned for several months.

Breeden was the only individual adversely affected by this "reorganization." Three of Breeden's comparable co-workers, Shirley Sandoval, Audrey Larsh, and Barbara Thornton, would continue to supervise numerous employees and perform their primary job duties. ER 173. In her new position Breeden spent appoximately 90% of her time handling FMLA matters. ER 276. Significantly, when Breeden was later transferred to Professional Development, her FMLA duties were assigned to a newly hired personnel analyst, Stephanie Landeros. Obviously the FMLA duties were below Breeden's skill level if they could be performed by a personnel analyst. ER 390, 391.

Breeden's Second "Oppositional Activity"

After Eldfrick's negative treatment of her, and her radical change in job duties, Breeden filed an Intake form with the Nevada Equal Rights Commission in March, 1995, alleging retaliation, sexual harassment and harassment. ER 70. The information on that form led to Breeden's Charge of Discrimination for sex discrimination and retaliation which was filed with the EEOC August 23, 1995. ER 73.

According to that Charge, Breeden alleged she was "being discriminated and retaliated against because of her sex, female." Breeden's Charge goes on to state that she "protested the articulation of a sexual innuendo" and has been "exposed to a hostile work environment and retaliation through harassment" since that time. This lawsuit, based upon that Charge, was filed on April 1, 1997. The lawsuit does not mention sexual harassment. ER 34.

Breeden's Second Tangible Employment Action

Ten days after Breeden filed her lawsuit, on April 10, 1997, Rice met with the Executive Director of Breeden's union and informed him that she was contemplating transferring Breeden to a newly created position, Director of Professional Development. This position, which was located in a trailer at the District's "North Ninth" office several miles away from the central office where Breeden previously worked, was being currently performed by an Administrative Specialist (Range 38), Donna Mahler. ER 134, 172, 408-10.

Rice carried through on her contemplation. In May, 1997, Rice informed Breeden of her transfer to "Siberia," as the North Ninth location was known. Rice explained the transfer was necessary because Breeden's unemployment and workman's compensation duties were being assigned to the Business Division. ER 172. However, as soon as Breeden assumed her new position, the unemployment and workman's compensation duties were reassigned to Eldfrick's department and a new personnel analyst position was created to handle FMLA leave. ER 172-73. Ironically, by removing Breeden from the support staff office Rice was able to increase the titles and salaries of her existing staff, including Eldfrick who received a promotion to Executive Director at a cost of $4,949.00. ER 82.

Breeden's new office was in a portable trailer several miles from the School District's main office, Breeden's previous work location. Instead of having her own private office, Breeden now had a cubicle. Instead of routinely interacting with District Administrators and School Board trustees, Breeden rarely saw them. Her position is largely clerical and represents a significant demotion in responsibility from her previous assignments. ER 172-74. Thus, three years after she dared to complain that Eldfrick had acted unprofessionally and was treating her with hostility because of her sex, Breeden found herself working in a trailer performing clerical tasks, while Eldfrick ended up with a new title and a significantly increased salary, still working at the main office. Coincidence? Breeden doesn't think so.

At the conclusion of discovery the School District filed a motion for summary judgment. Consistent with

her Charge of Discrimination and Complaint, Breeden did not oppose the motion with respect to the School District's assertion that she could not state a viable hostile environment sexual harassment claim. ER 162.

In summary, contrary to the School District's assertion, Breeden's case is not based solely upon an innocent comment that her supervisor was required to read. Breeden's first allegation of retaliation is based upon her complaints regarding the October 21, 1994 meeting *and* Eldfrick's adverse treatment during the two week period which ended with her complaint to Rice. Breeden alleges those complaints led to the significant change in her job duties which occurred on December 12, 1994, one month later.

Breeden's second allegation of retaliation is based upon her filing this lawsuit, an act which is absolutely protected under Title VII, and her subsequent reassignment to be the Director of Professional Development based out of a trailer several miles removed from the School District's main building. There is no question that Breeden is protected with respect to this action, so if this Court believes this transfer constituted an "adverse employment action," Breeden's lawsuit must go forward.

REASONS FOR DENYING THE PETITION

Contrary to the School District's representation, this case does not squarely present, on a short and well-defined record, the issue of what is an "adverse employment action." This Court has previously acknowledged

that a "reassignment with significantly different responsibilities" may constitute a "tangible employment action." *Burlington v. Ellerth*, 524 U.S. 742, 761 (1998) (emphasis added). Based upon this holding, if Breeden can demonstrate that she experienced a major reassignment this Court does not need to consider the School District's argument that the Circuits are split as to the issue of what constitutes adverse action.

As Breeden has summarized above, there are at least, for summary judgment purposes, two instances where Breeden was given significantly different responsibilities which would constitute adverse employment actions. Thus the question which the School District seeks to have this Court decide is in reality not a viable issue in Breeden's case.

A. Breeden Experienced Two Adverse Employment Actions

1. Breeden's Undesirable Reassignments in 1994 and 1997 Qualify as Tangible Employment Actions Previously Recognized by this Court

The School District seeks to have its petition for certiorari granted by asserting that Breeden's case is similar to *Ray v. Henderson*, 217 F.3d 1234 (9th Cir. 2000), thus inferring that by ruling on Breeden's case this Court can effectively rule on the holding in *Ray*. However, the facts in Breeden's case are far different from those in *Ray*, and thus it would be improper to use Breeden's case to overturn the holding in *Ray*.

In *Ray* the plaintiff alleged he was retaliated against when the post office eliminated an employee complaint

program, a flexible start-time policy, lockdown procedures, and reduced workload. Although the reduced workload caused a reduction in Ray's pay, the other actions would not constitute a "reassignment with significantly different responsibilities." Thus the Ninth Circuit's decision to uphold Ray's assertion that he had suffered an adverse employment action was necessarily based upon a finding that an act falling short of a significant reassignment would qualify.

In contrast, in Breeden's case in both 1994 and 1997 she encountered "reassignments with significant different responsibilities." In 1994, prior to her complaints, Breeden was the Director of Support Staff, supervising 15 employees who were in turn responsible for managing the employment policies which covered all non-licensed School District employees. After her complaints, Breeden's supervisory duties were given to Eldfrick, the individual she complained about, while Breeden was relegated to handling FMLA applications and assisting injured employees who were released to return to work to find jobs. Breeden testified that 90% of her time was taken up handling the FMLA duties, which were assigned to a clerical person when she was subsequently transferred. Obviously, at least for purposes of summary judgment, this was a significant change in her job duties.

In 1997, shortly after she filed this lawsuit, Breeden again experienced a significant change in her job duties. At that time Breeden's position was eliminated and she was transferred to a new position, Director of Professional Development, which handled continuing education for licensed staff from a trailer located several miles away from her previous office in the School District's main

facitility. The individual who held this position prior to Breeden, Donna Mahler, was a Range 38 Administrative Specialist, three levels below Breeden. For purposes of summary judgment, this change was significantly different and thus constituted a tangible employment action.

Ironically, as a result of the reorganization which placed Breeden in the Professional Development office also resulted in a significantly different change in Eldfrick's position – he was given a new title and a $5,000 per year pay raise, even though he was not given any additional responsibilities. ER 82.

2. The Ninth Circuit's Approach to Adverse Treatment is Consistent With Other Circuits and EEOC Guidelines

Under 42 U.S.C. § 2000e-3(a), it is unlawful "for an employer to discriminate" against an employee in retaliation for engaging in protected activity. Presumably in choosing the term "discriminate" Congress intended to include acts which would qualify as discriminatory conduct under other sections of the Act, and did not intend to limit retaliation claims to instances where only a termination or demotion are involved. As the D.C. Circuit has held, "The Statute itself proscribes 'discrimina[tion]' against those who invoke the Act's protections; the statute does not limit its reach only to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer or demotion." *Passer v. American Chemical Soc.*, 935 F.2d 322, 331 (1991).

Breeden does not dispute the School District's claim that the Circuits are split on the definition of "adverse

employment action." The Ninth Circuit, along with the First, Seventh, Tenth, Eleventh and D.C. Circuits, have articulated similar opinions as to what may constitute an adverse employment action. These definitions are consistent with the EEOC's position as articulated in the EEOC's Compliance Manual on Retaliation. *Ray*, 217 F.3d at 1241-42.

According to the EEOC, an "adverse employment action" can be "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity." EEOC Compliance Manual Section 8, "Retaliation" Par. 8008 (1998). As this Court has previously acknowledged, EEOC Guidelines "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986).

The EEOC's test focuses on the deterrent effects of an employment action instead of focusing on the ultimate effects. *Ray*, 217 F.3d at 1243. In doing so it is consistent with this Court's recent holdings which encourage employers to implement sexual harassment policies and penalize employees who fail to utilize those policies. *Faragher v. City of Boca Raton*, 524 U.S. 775, 806-07 (1998) ("If the plaintiff unreasonably failed to avail herself of the employer's preventive or remedial apparatus, she should not recover damages that could have been avoided if she had done so.")

If it is important to encourage employees to utilize an employer's internal grievance procedures, it is equally important to assure employees that they will be protected

if they do so. What will co-workers learn if they see an employee complain about her supervisor, and then one month later have her job duties totally restructured and her subordinates taken from her and given to her harasser? It does not take a rocket scientist to know the message that was sent when Breeden was stripped of her supervisory responsibilities in December, 1994, and then again in July, 1997, when she was placed in a lesser position far removed from the School District's main office. If these employment actions do not qualify as retaliatory conduct, then Breeden's co-workers and subordinates will clearly understand the School District's anti-retaliation policy – complain at your own risk.

B. Breeden Reasonably Believed She Was Complaining About Illegal Conduct

1. Breeden Engaged in Protected Activity When She Complained About Eldfrick's Comments and Conduct and When She Filed This Lawsuit

In an attempt to obtain this Court's attention, the School District has focused solely upon Breeden's first protected activity, asserting it was not based upon a reasonable belief. This argument conveniently ignores Breeden's second protected activity – the filing of this lawsuit. There is no reasonable belief requirement for retaliation which results from "participation" in Title VII proceedings, so whether Breeden had a reasonable belief is not dispositive of Breeden's case, but only applies to the 1994 reorganization.

With respect to what happened in 1994, the School District seeks to minimize the basis for Breeden's complaint about Eldfrick's conduct, thereby making it appear that her concerns were not justified. For purposes of summary judgment, however, there is a much less benign view of the facts than the one that has been spun by the School District.

First, it is critical to recognize that Eldfrick's comments were made during a meeting with Breeden and her male subordinate, Jim McIntosh. By reading the Grand Canyon comment, shrugging his shoulders and staring at Breeden, then stating that he did not know what the comment meant, Eldfrick was obviously doing more than his job required, he was making a sexual joke at Breeden's expense. When McIntosh said, "I'll tell you later," and then both he and Eldfrick laughed, Eldfrick and McIntosh were acknowledging that the joke was inappropriate for Breeden to hear, and that she would be offended by the answer.

Whether the joke was sexual harassment or sex discrimination, it was clearly based upon sex and clearly Breeden was being treated differently because of her sex! A 38-year-old administrator is not required to put up with such school yard behavior, particularly when it undermines her position with her subordinate. Thus Breeden was right to be upset, and justified in complaining about what took place on October 21, 1994.

Furthermore, Breeden did not just complain about Eldfrick's conduct during the October 21, 1994 meeting. After she went to Eldfrick and told him she did not appreciate his behavior, Eldfrick changed his treatment of

her. After taking two weeks of Eldfrick's hostility and abuse, Breeden complained again, first to Goldman and then to Rice. It was after this second series of complaints that Breeden's job duties were dramatically changed. Thus to determine whether Breeden reasonably believed she was being subjected to unlawful conduct it is necessary to consider everything that happened during the two week period that led up to her second series of complaints, not just the events of October 21. See, e.g., *O'Rourke v. City of Providence*, 235 F.3d 713, 729 (1st Cir. 2001) ("[W]here a plaintiff endures harassing conduct, although not explicitly sexual in nature, which undermines her ability to succeed at her job, those acts should be considered along with overtly sexually abusive conduct in assessing a hostile work environment claim.")

While the totality of Eldfrick's conduct during that two week period might not constitute a legally actionable hostile environment, it was certainly enough to give Breeden a reasonable belief that he was violating her rights based upon her sex. Furthermore, it was Goldman, not Breeden, who used the term "sexual harassment," and it was Rice, not Breeden, who involved the School District's affirmative action officer. If Goldman and Rice believed Breeden's complaints were sufficient to warrant involvement by the affirmative action officer, then it was certainly reasonable for Breeden to believe she was being subjected to conduct which violated Title VII.

The School District compares the facts in *Clover v. Total System Services, Inc.*, 176 F.3d 1346 (11th Cir. 1999), with the facts in Breeden's case, asserting that *Clover* somehow proves "[j]ust how far the panel majority departed from the approach consistently taken in the

other Circuits." That analogy is absurd. In *Clover* the plaintiff complained that she perceived a 17-year-old co-worker to be sexually harassed by a supervisor because there were visits without any business purpose and other non-sexual conduct. The Eleventh Circuit rightly found that this conduct could not reasonably be believed to constitute sexual harassment.

In contrast, Breeden did not complain about conduct she observed between a supervisor and a co-employee, she complained about conduct she experienced from her supervisor! There is no question but that Eldfrick's sexual joke was inappropriate given the presence of Breeden's male subordinate. Neither is there any question but that Eldfrick's conduct after Breeden complained was inappropriate. Thus it was certainly reasonable for Breeden to complain about Eldfrick's behavior, particularly given the School District's own employment discrimination regulations which defined sexual harassment to include "[u]ninvited sexual teasing, jokes or remarks or questions," along with "[r]etaliation against employees for complaining about [that behavior]." ER 177.

It is also important to remember that these incidents occurred in 1994, which in sexual harassment litigation was light years ago. The body of knowledge as to what constituted sexual harassment in 1994 was infinitely smaller than the body of knowledge today. Even so, this Court's recent pronouncements about the subject create something less than a bright line test, having given the following explanation:

> The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships

> which are not fully captured by a simple recitation of the words used or the physical acts performed. *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 82 (1998).

How is an employee to know when she has a "reasonable belief" she is being sexually harassed and subjected to abusive behavior based upon this standard?

2. Employees Subjected to Discriminatory Conduct Are Placed on the Horns of a Dilemma by the School District's Argument

Since this Court's rulings in the two recent cases, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), employees are now *required* to take advantage of employer policies to prevent or correct sexually harassing behavior, lest they become the losing party to the affirmative defense provided employers in those decisions. The identical holdings of these cases state:

> And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.

Ellerth, 118 S.Ct. 2257 at 2270; *Faragher*, 118 S.Ct. 2275 at 2293.

Indeed, the EEOC's Enforcement Guidance, Number 915.002 (June 18, 1999), has been adopted to address the requirements established in *Faragher* and Ellerth. In this

Notice, the EEOC reiterated the rationale for the second prong of the affirmative defense, or the requirement that the employee exercise reasonable care by taking advantage of the employer's preventive/corrective opportunities. The EEOC Notice reads, in part:

> This element of the defense arises from the general theory "that a victim has a duty 'to use such means as are reasonable under the circumstances to avoid or minimize the damages' that result from violations of the statute." *Id.* at 18.

The Notice further instructs, "The employee may directly say to the harasser that s/he wants the misconduct to stop, and then wait to see if that is effective in ending the harassment before complaining to management." *Id.* Also stated in the Notice, and of relevance to the instant action, is the section regarding "Risk of Retaliation." In part, it reads:

> An employer cannot establish that an employee unreasonably failed to use its complaint procedure if that employee reasonably feared retaliation . . . To assure employees that such a fear is unwarranted, the employer must clearly communicate and enforce a policy that no employee will be retaliated against for complaining of harassment. *Id.* at 19.

In its conclusion, the EEOC found that this Court's rulings create *"an incentive for employees to alert management about harassment before it becomes severe and pervasive."* *Id.* at 20 (emphasis added).

The *Faragher, Ellerth* and EEOC legal obligation requirement of employees to complain about sexually harassing activity before it becomes severe or pervasive

raises an interesting question regarding the legal standard established for engaging in "protected activity" under the opposition clause of Title VII. Namely, since the legal standard for retaliation under Title VII's opposition clause requires a reasonable, good faith belief that the employer has engaged in an unlawful employment practice, and the legal requirement under *Faragher* and *Ellerth* require employees to "take advantage" of employer preventive/corrective opportunities before the harassment becomes unlawful (severe and pervasive), what happens in the situation where the employee registers a complaint that may not evidence a "reasonable" belief that the employer is violating Title VII, but s/he does so to attempt to "prevent" and "correct" the existing behavior before it becomes unlawful, but then suffers retaliation because of it? According to the current legal standards, this individual would not have engaged in protected activity since s/he did not reasonably believe the behavior was severe enough to violate Title VII.

Likewise, what happens in the same situation if the employee does not complain or does not "take advantage" of the preventive/corrective policies soon enough? According to this Court and the EEOC, the employer would certainly hold that inaction against the employee if the behavior escalated to become severe or pervasive, and the employee would have no recourse against the affirmative defense in even the most heinous of sexual harassment cases. Of course, as the EEOC noted, the employee could advance a defense of fear of retaliation. But, this approach leaves the employee with the uneasy decision of either facing retaliation or being forced into the position of needing to advance a defense.

As sexual harassment has become a spotlight of legal and lay discussion in our society, it may become more and more difficult to resolve the described quandary. Employees may become privy to the reality that one or two instances of sexual-related misbehavior does not constitute sexual harassment under Title VII, but they will not be protected against retaliation if they uphold their legal obligation under *Faragher* and *Ellerth* and make their employer aware of the admitted "legal", but inappropriate, activity. On the other hand, if the employee does nothing, she will subvert her own claim for sexual harassment, if and when it materializes, by virtue of the employer's affirmative defense.

CONCLUSION

Shirley Breeden acted appropriately when she complained to her supervisor after he offended and embarrassed her in front of her subordinate by making her the subject of a sexual joke. She also acted appropriately when she complained about her supervisor's abusive behavior which began immediately after her complaint. To condone what happened next, when Breeden's subordinates, including Jim McIntosh, the individual who participated in the joke, were taken away from her and given to her supervisor, Eldfrick, who had engaged in the inappropriate behavior, would send the exact wrong message to other employees who might be concerned about improper conduct on the part of their supervisor.

If this Court's rulings which require employers to notify employees of their rights and require employees to

exercise those rights are to have any meaning, then strong rules prohibiting retaliation must be required. Breeden served as the Director of Support Staff Services for four years prior to this incident, all the while having her job duties expand, not diminish, and yet within one month of her complaints her subordinates were taken away and her duties are dramatically changed. While the jury may ultimately conclude that the School District's actions were lawful, surely these facts are sufficient to allow a jury, not a judge, to decide the appropriateness of those actions.

Accordingly, Respondent respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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